

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

IN RE:)	
)	
MARGARET ANN LONG)	
)	
Debtor.)	Case No. 03-21692-drd
)	
NOEL MAGEE,)	
)	
Plaintiff,)	Adv. No. 03-02049-drd
)	
v.)	
)	
MARGARET ANN LONG,)	
)	
Defendant.)	
)	
)	

MEMORANDUM OPINION AND ORDER

This is an adversary proceeding in which plaintiff, as conservator ad litem, seeks an order declaring nondischargeable his claims against debtor Margaret Ann Long (“Debtor”) pursuant to an order entered on September 26, 2001, in the Probate Division of the Circuit Court of Boone County, pursuant to 11 U.S.C. § 523(a)(4). In addition, Plaintiff seeks an award of attorney’s fees for costs incurred in litigating the dischargeability of the debt. Defendant admits the allegations of the Complaint and concedes that the claim established by the Circuit Court’s order is nondischargeable, but contends that Plaintiff has no right to an award of attorney’s fees incurred in the adversary proceeding before this Court. This Court has jurisdiction over the claim contained in the Complaint under 28 U.S.C. § 1334(b). It is a core proceeding which this Court may hear and determine pursuant

to 28 U.S.C. § 157(a) and (b)(2)(I). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth below, I hold that Plaintiff is not entitled to his attorney's fees incurred in this adversary proceeding.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the allegations of the Complaint, which are admitted by Defendant, Defendant was appointed conservator of her husband's estate by the Probate Division of the Circuit Court of Macon County in February, 1997. After certain questions were raised about Defendant's management of the estate, Plaintiff was appointed conservator ad litem on February 7, 2001, by the Circuit Court of Boone County, Missouri to which venue the proceeding had been transferred. On May 11, 2001, Plaintiff filed a motion for an order to show cause against Defendant alleging, among other things, that funds of the estate had been deposited into Defendant's personal checking account, that certain personal expenses of Defendant had been paid using estate income, that Defendant had paid unauthorized attorney's fees from estate funds and that none of the annual settlements filed by Defendant had obtained court approval. After an evidentiary hearing, the court on September 26, 2001, entered its Order and Judgment against the Defendant finding that Defendant had breached her fiduciary duties to the estate and violated and failed to comply with various court orders. The court entered judgment against her and in favor of the estate in the amount of \$15,280.12 and also awarded attorney's fees to Plaintiff in the amount of \$3,600.00.

On October 17, 2003, Plaintiff filed his Complaint initiating this proceeding seeking a determination that the debt embodied in the Order and Judgment, including the accompanying award of attorney's fees, is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). In addition, Plaintiff sought an award of attorney's fees in the amount of \$1,500 for time and expense incurred

in prosecuting this adversary proceeding. Defendant filed her answer to the Complaint, admitting the allegations and conceding that the debts created by the Order and Judgment, including the award of attorney's fees to Plaintiff, are nondischargeable, but denying that Plaintiff is entitled to an award of fees and expenses incurred by his counsel in this proceeding. Accordingly, the only issue before the Court is whether Plaintiff is entitled to an award of his post-bankruptcy fees incurred in this adversary proceeding filed to determine dischargeability of the debt.

II. DISCUSSION

It has long been the rule in American courts that parties to litigation bear their own attorney's fees and that a court may not award attorney's fees to a prevailing claimant in the absence of either a statutory provision authorizing the award of such fees or a contractual right. *Seimer v. Nangle (In re Nangle)*, 281 B.R. 654, 657 (B.A.P. 8th Cir. 2002); *Williams v. Kemp (In re Kemp)*, 234 B.R. 461, 472 (Bankr. W.D. Mo. 1999). That principle has been widely applied to the recovery of attorney's fees incurred in litigating dischargeability issues under the Bankruptcy Code. *Sherman v. Reilly (In re Reilly)*, 244 B.R. 46, 51 (Bankr. D. Conn. 2000); *Wisely v. Beattie (In re Beattie)*, 150 B.R. 699, 704 (Bankr. S.D. Ill. 1993); *Members Credit Union v. Kellar (In re Kellar)*, 125 B.R. 716, 719-720 (Bankr. N.D.N.Y. 1989).¹ Since there is no contract between Plaintiff and Defendant, that cannot be the source of any award of attorney's fees in this case. Neither is there a Bankruptcy Code provision which authorizes the recovery of attorney's fees. As the Bankruptcy Appellate Panel said in *Nangle*:

Bankruptcy law is loath to award attorney's fees absent some basis in statute or

¹In *Nangle*, the Bankruptcy Appellate Panel also recognized that there are two additional limited exceptions to the American Rule which authorize recovery of attorney's fees for a litigant who has bestowed a common benefit on a class or protected a common fund or to rectify abusive litigation conduct, neither of which is applicable here. *Nangle* 281 B.R. at 659.

contract. There are four specific statutory provisions for the award of attorney's fees in the Bankruptcy Code. Section 506(b) permits an oversecured creditor its attorney's fees if the contracts so provides. Section 303(i) grants the bankruptcy court the discretion to award attorney's fees to the debtor in the event an involuntary petition is dismissed without the consent of the debtor. Section 362(h) allows the court to award attorney's fees to a party injured by a willful violation of the automatic stay. And, section 523(d) provides that a debtor may recover its attorney's fees if a creditor brings a dischargeability proceeding that the court finds was not substantially justified.

Nangle, 281 B.R. at 658-59. None of the statutory provisions cited in *Nangle* is applicable to this case. As the above list indicates, Congress has authorized the recovery of attorney's fees in nondischargeability cases only in the scenario in which the debtor prevails in a proceeding involving the dischargeability of claim on a consumer debt brought under subsection (a)(2) and the court finds the creditor's position was not substantially justified. There is no parallel provision for recovery of attorney's fees by a successful creditor in any situation. Several courts have seized on this distinction in denying requests for an award of fees by creditors prevailing in nondischargeability cases. *Reilly*, 244 B.R. at 51 (§ 523(d) is sole relevant statutory authority for fee shifting in dischargeability litigation); *Kellar*, 125 B.R. at 720 ("In only providing for the debtor's reimbursement of reasonable attorney's fees and costs where a creditor's dischargeability action on a consumer debt is not substantially justified, similar awards to a successful creditor are explicitly and specifically precluded under the statute.")

Plaintiff claims that attorney's fees may be awarded to a creditor who prevails on a dischargeability complaint whenever attorney's fees are "available as a matter of law." In support of this position, Plaintiff cites *Cohen v. de la Cruz*, 523 U.S. 213 (1998). In *Cohen*, the Supreme Court was faced with deciding whether treble damages, attorney's fees and costs available to a creditor under the New Jersey Consumer Fraud Act were also nondischargeable in a proceeding brought under 11 U.S.C. § 523(a)(2)(A). The Court interpreted the language of § 523(a) to mean

that all damages flowing from a debtor's fraud and a part of the creditor's claim, including the treble damages, attorney's fees and costs to which the claimant was entitled under the applicable New Jersey statute were nondischargeable.

This Court does not read *Cohen* as broadly as does Plaintiff. The Court agrees with Debtor's interpretation of *Cohen* which is that it deals only with the question of whether certain components of the claim such as treble damages, attorney's fees and costs, when they are a portion of creditor's allowed claim, which claim is also nondischargeable, may themselves be excepted from discharge. The principle focus of the opinion in *Cohen* is in fact not on attorney's fees, but on the treble damages recovery the claimant was allowed under New Jersey law. The amount of the fees, when incurred and for what services rendered are never clearly revealed. The case does not hold that the bankruptcy court may award fees to a successful litigant in a nondischargeability action when the only issues being litigated are those of bankruptcy law.

The facts of *Cohen* do not support the broad proposition for which Plaintiff cites the case which is that fees may be awarded to a litigant whenever they are "available by law." The fees in *Cohen* were based on an authorization provided by state statute. Plaintiff cites no statutory authorization for the fee award made to him in the Circuit Court.

Finally, the fees in *Cohen* were incurred as a part of the process of liquidating the claim and were part of the claim pursuant to the applicable New Jersey statute. In this instance, the claim was already fully liquidated, having been litigated before the filing of the petition. Plaintiff here did not have to litigate any state law issues in this proceeding. The only issue in this adversary proceeding is whether that claim is nondischargeable as a matter of bankruptcy law. The rule of *Cohen* does not authorize the recovery of fees in that situation. *See, e.g., Atchison v. Atchison (In re Atchison)*, 255 B.R. 790, 793 (Bankr. M.D. Fla. 2000) ("*Cohen* does not itself

create an independent right to attorney's fees for the benefit of a party who prevails in a § 523 dischargeability proceeding. Instead, it clarifies that attorney's fees supported by statute are included in the debt that may be determined to be nondischargeable."); *Renfrow v. Draper*, 232 F.3d 688, 694 (9th Cir. 2000) (if state law authorizes recovery of attorney's fees and state law issues are litigated in bankruptcy, attorney's fees are available, but only to the extent they are incurred litigating the state law issues).

Turning back to the holding in *Nangle* confirms that these limitations on the recovery of attorney's fees in dischargeability litigation are understood to apply in this Circuit and are applicable to this case. In *Nangle*, the creditor held claims against the debtor based upon the Fair Debt Collection Practices Act and an award of damages for contempt. The FDCPA claim included an award of attorney's fees. Consequently, in that case there was a statutory basis for an award of attorney's fees which had in fact been made as part of the creditor's prepetition claim. Nonetheless, the Bankruptcy Appellate Panel concluded that the creditor was not entitled to an award of attorney's fees for establishing the nondischargeability of the debt in the adversary proceeding filed in the bankruptcy court. Likewise, the Plaintiff here is not entitled to an award of fees.

III. CONCLUSION AND ORDER

In summary, the Court finds, based on the Debtor's admissions, that the award made to Plaintiff by the Circuit Court in the amount of \$15,280.12, plus the accompanying award of attorney's fees in the amount of \$3,600.00, are excepted from discharge pursuant to 11 U.S.C. § 523(a)(4) as having resulted from a defalcation by a fiduciary. The Court further finds that Plaintiff is not entitled to an award for attorney's fees incurred in this nondischargeability proceeding because he has no contractual right to such fees and because there is no statutory

provision authorizing the Court to award post-petition fees for litigating bankruptcy law issues in this context. It is therefore

ORDERED that the amounts due Plaintiff pursuant to the Order and Judgment entered in his favor and against Defendant by the Probate Division of the Circuit Court of Boone County, Missouri on September 26, 2001, in Case No. 1399PR007705, be and hereby are determined to be nondischargeable pursuant to 11 U.S.C. § 523(a)(4); it is further

ORDERED that Plaintiff's request for attorney's fees incurred in this nondischargeability proceeding be and hereby is denied.

SO ORDERED this ____ day of January 2004.

/s/ Dennis R. Dow
Bankruptcy Judge